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IN THE

Supreme Court of the United States

No. 1422

OCTOBER TERM, 1969

WELTRONIC CO.,
Petitioner,
v.
NATIONAL LABOR RELATIONS BOARD,
and
Local 155, INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR LOCAL 155, INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. A19-25) is reported at 419 F.2d 1120. The Board's Decision and Order (Pet. B25-42) is reported at 173 NLRB #40.

JURISDICTION

The judgment of the Court of Appeals was entered on December 16, 1969. Rehearing was denied on January 22, 1970, and mandate was stayed pending the filing of the petitioner's petition. The petition for a writ of certiorari was filed on or about April 6, 1970. The Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the employer is under an obligation to bargain with the certified bargaining representative about a prospective decision to move bargaining unit work to another of its facilities absent contractual language which "clearly and unmistakably" waives the bargaining representative's right to such bargaining?

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. §151, *et seq.*), are as follows:

> "§7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right

may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

"§8.(a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)."

STATEMENT

A. The Board's Findings of Fact

Since 1960 the Company has manufactured and sold plant central equipment, a complex system utilized to monitor and control manufacturing operations (A. 88a, 92a; 122a-124a).[1] In May, 1965 certain employees at Weltronic's Eight Mile plant began performing work on the plant central equipment. This work consisted of welding and assembly of cabinets, spray painting, and wiring and electronic assembly work (A. 92a; 20a-22a, 33a-35a, 43a-44a, 47a, 50a).

The collective bargaining agreement entered into between the Company and the Union on September 1, 1964 covers the relevant time period involved herein and contains the following relevant provisions:

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[1] "A" references are to the Record Appendix filed in the Court of Appeals. References preceding a semi-colon are to the Board's findings; those following are to the supporting evidence.

"Article I

"Recognition

"Section 1. . . .

* * * * *

"(b) In the event the Company discontinues its operations at the present site and moves to another location in the Detroit Metropolitan Area, seniority employees who can and are willing to accept work at the new location will be transferred to such a new location with all their seniority, prevailing rates of pay and the prevailing contract with the AFL-CIO-UAW and Local 155.

"Section 2. The Company will negotiate at all times necessary in the manner provided herein, with the chosen accredited representatives of its employees for the purpose of determining any disputes which may arise as to wages, rates, working conditions, discriminations or dismissals, and will adjust any grievances which may now exist or may arise in the future.

* * * * *

"Section 4. The Union agrees that Management of the Company has the right to manage the affairs of the business, to control its properties, and equipment, and to direct the working forces of the Company in accordance with and subject to the terms of this Agreement. Said functions of Management include the right to hire, discharge or discipline for just cause, to establish new jobs and discontinue jobs, maintain discipline and efficiency of employees, to determine the type of products to be manufactured, the location of plants, plan scheduling of production, methods, processes, and means of manufacturing."

"Article IV

"Seniority

"Section 9. In the event of a reduction in the work force, the following procedure shall be observed:

"First: Probationary employees shall be laid off and no overtime will be worked as long as employees with seniority are laid off, except in case of emergency by mutual agreement.

"Second: Seniority employees will be laid off in accordance with their seniority standing, provided the senior employees are capable of meeting the normal standard of efficiency for the job they claim within a period not to exceed three working days.

"Third: When a further decrease of employees is necessary, no layoff shall occur if it is possible for all regular employees to work thirty-two (32) hours per week. The thirty-two (32) hour week shall not continue after four (4) weeks in any calendar year unless agreed to by the Company and the Shop Committee. When an increase in force is necessary, the above procedure shall be reversed.

* * * * *

"Section 11. When new jobs are created or vacancies occur, the oldest employees in point of service shall be given preference in filling such new job or vacancy so far as consistent with the ability of the new employee to perform the services required. All new jobs will be posted forty-eight (48) hours before such vacancy shall be filled" (A. 110a-113a).

On April 1, 1967 the Company moved the plant central wiring and electronic assembly work to its new Telegraph plant, located about three miles from the Eight Mile plant (A. 89a, n 1, 94a-95a; 41a-42a, 47a-48a). One of the reasons for the transfer of the work out of the Eight Mile

plant was to avoid paying the contract wages in effect at the time and instead to pay non-union employees lower wages (A. 95a, 98a; 14a-15a, 27a-28a). A partial reason was the crammed space at the Eight Mile plant (A. 89a, n 1). The Union was neither notified of the pending move nor given any opportunity to bargain about it (A. 89a, n 1, 95a; 13a, 20a, 33a, 41a-42a, 45a).[2]

The movement of the work out of the Eight Mile plant had an immediate and telling effect on the bargaining unit and the employees of the Company. Employees French and Labine who had spent virtually all of their time performing plant central work suddenly found that their jobs were gone. They were subsequently assigned to other tasks which had previously been performed by other bargaining unit employees. Other employees whose duties had consisted partially of plant central work suddenly found that that portion of their work duties had disappeared. Some of these employees were subsequently laid off. No employees were transferred to the Telegraph plant nor were any of the laid off employees called back to work at either plant, although one employee requested such a transfer (A. 95a) and at least five new employees were hired at the Telegraph plant to perform the tasks formerly performed by the bargaining unit employees refered to above (A. 94a-96a; 4a-5a, 21a-23a, 33a-35a, 77a-80a, 120a-121a). The wages paid the new hires at the Telegraph plant were considerably lower than those paid the employees at the Eight Mile plant who had performed the same work (A. 96a, 98a; 14a-15a, 27a-28a, 121a).

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[2] The Company, in its petition (p. 5) insists that notice was given. However, the Board and Court of Appeals found otherwise, as noted above. Such finding is binding here.

As noted above, the Union was never given notice of the pending move. It learned of the action only after the work was moved out of the Eight Mile plant. Acting to protect its options so that it could pursue whatever remedies were available to it, the Union filed a grievance alleging a breach of contract and insisted on bargaining over the work transfer. The Company, however, taking the position that it had a right to do as it did, denied the grievance *and* refused to bargain with the Union concerning the work transfer.[3] Later, realizing that the contract did not cover this transfer of unit work from the bargaining unit to another plant, and realizing further that Weltronic had absolutely no intention of bargaining ove the transfer, the Union abandoned the grievance and filed the Charge herein (A. 95a-97a; 14a-17a, 114a-119a).[4]

B. The Decisions of the Board and the Court of Appeals

Upon the foregoing facts, the Board found that the employer had not complied with its duty to bargain with the Union concerning the movement of certain operations from the bargaining unit to another plant. The Board found that the company's reasons for making the move were partially economic (cramped space) and partially bad faith (desire to avoid paying contract rates to Union members).

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[3] The petitioner's assertion (Pet. 7) that it first learned of the Union's desire to negotiate when it received the Charge in this matter is belied by its own letter of April 26, 1967 wherein it stated that it would not "negotiate or arbitrate" this matter (A. 97a; 115a). In any event the Board found that the Union requested negotiations which request was denied. That fact is binding here.

[4] After filing the Charge, the Union made one further attempt to discuss this matter with the Company (A. 118a). However, the Company responded by curtly stating that it "[saw] no reason for further correspondence in the matter" because it would not bargain about the work transfer (A. 119a).

Substantially adopting the recommendations of the Trial Examiner the Board ordered the company to bargain with the Union concerning the move, to make the work available to bargaining unit employees at its then new location,[5] and to make whole any employees who suffered customary notices.

The Court of Appeals sustained the Board's findings and enforced its order in full (Pet. App. 19-25). In doing so, the Court reasoned that the employer was under a "statutory duty to give the union the opportunity to bargain" about the work removal "prior to removal of the work" (Pet. App. 23). The Court rejected the employer's argument that the work movement was a "management prerogative about which it was under no duty to bargain" under the Act (Pet. App. 22-23).

ARGUMENT

The basic question raised in the petition is whether the Court below erred in affirming the Board's decision that petitioner was under an obligation to notify and bargain with the Union about its desire to move the plant central work out of the bargaining unit prior to making its decision. This presents an issue which this Court has already answered and, therefore, it does not warrant review. In *Fibreboard Paper Prod. Corp. v. NLRB*, 379 U.S. 203, this Court held that an employer must bargain with a union about its decision to sub-contract out bargaining unit work prior to actually making and effectuating the decision. In

[5] The work has been moved again, rendering this aspect of the Order of dubious value. This aspect of the case is before the Board in supplemental proceedings now under way.

NLRB v. C & C Plywood Corp., 385 U.S. 421 this Court held that an employer must bargain about proposed changes in the wage structure prior to instituting them despite contract language similar to that involved here. The Court held that the Board had the power to interpret the contractual provisions there and to hold that its waiver language was not specific enough to constitute a waiver of bargaining over the subject matter in question. The Court below specifically followed *Fibreboard* and *C & C Plywood* in holding that the Board properly exercised its power in determining that the Union here had not contractually waived its right to bargain about the work move and, therefore, the employer violated the Act by acting as it did prior to giving the Union an opportunity to bargain. See *East Bay Union of Machinists, Local 1304 v. NLRB*, 322 F.2d 411, 415 (D.C. Cir., 1963), aff'd *sub nom., Fibreboard Paper Prod. v. NLRB, supra.*[8]

[8] Nor is there substance to petitioner's further contention that "[b]argaining is not required by the Act" (Pet. 18). Sections 8(a)(5) and 8(d) of the Act adequately answer it.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: April 23, 1970

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